89- 1518

No. ___

In The

Supreme Court of the United States

October Term, 1989

KENNETH G.M. MATHER, AS TRUSTEE OF THE ESTATE IN BANKRUPTCY OF M. FRANK WATSON AND BETTY L. WATSON, AND BRIAN HARJO WATSON,

Petitioners,

v.

BILL WEAVER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seizure of property in order to satisfy a judgment, without giving the property owners a meaningful prior opportunity to assert valid claims that much of the seized property is exempt from execution under state law, is immune from due process scrutiny on the ground that the state provides adequate postdeprivation remedies.

2. Whether a county, and the Sheriff and Deputy Sheriff of that county in their official capacities, can escape liability for a Fourth Amendment violation occurring in the course of carrying out a writ of execution, even though the decision to break into petitioners' home without legal authority was made by the officials with policymaking power with respect to the carrying out of such writs.

3. Whether a private law firm is entitled to escape respondeat superior liability in an action under 42 U.S.C. § 1983, despite state law providing for respondeat superior liability.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs below, are Kenneth G.M. Mather and Brian Harjo Watson. The original plaintiffs in this action were M. Frank Watson and Betty L. Watson on behalf of themselves and their then-minor son Brian. During the pendency of this litigation in the district court, Mr. and Mrs. Watson filed for bankruptcy, and Brian Watson attained the age of majority. Thus, the Watsons' bankruptcy trustee and Brian Watson became the plaintiffs. See App., *infra*, 2a n.1. Mr. Mather is the current bankruptcy trustee for the Watsons.

Respondents, defendants below, are Bill Weaver; Tom Newton; Andrew S. Hartman; Andrew S. Hartman, P.C.; Barkley, Rodolph, White & Hartman; S & T Gas Transmission Company, Inc.; John Doe; Jane Doe; and the Board of Commissioners of Okmulgee County, Oklahoma.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Kenneth G.M. Mather, as trustee of the estate in bankruptcy of M. Frank Watson and Betty L. Watson, and Brain Harjo Watson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported. The opinions of the district court (App., *infra*, 5a-7a and 8a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1989. Petitions for rehearing were denied in part and granted in part on November 28, 1989 (App., *infra*, 13a-14a and 15a-17a). On February 26, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including March 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

Respondent Andrew Hartman is a partner in the law firm Barkley, Rodolph, White & Hartman, which is also a respondent. On behalf of his client S & T Gas Transmission Company (also a respondent), Hartman won a judgment of $141,787.21 against petitioners in Oklahoma state court.[1] That judgment eventually was reduced on appeal to $1, but respondents rushed to satisfy the six-figure judgment by obtaining a writ in aid of execution before the appellate proceedings ran their course.

Oklahoma law exempts from judgment creditors much of the personal property that Hartman sought to confiscate. Before petitioners' valid exemption claims could be adjudicated, however, Hartman and respondent Tom Newton, a Deputy Sheriff of Okmulgee County, Oklahoma, broke into the Watsons' home and carted off two truckloads of their property.[2] Those actions were taken at the orders of respondent Bill Weaver, the Sheriff of Okmulgee County, and Tom Giulioli, the District Attorney for Okmulgee County.

Petitioners filed suit under 42 U.S.C. § 1983 against Hartman, the law firm, S & T, the Sheriff and Deputy

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[1] Petitioner Mather represents the interests of the Watson family (see p. ii, *supra*), and we will refer to the Watsons as "petitioners."

[2] Oklahoma law does not allow forcible entry into a dwelling house in aid of execution. The district court so recognized. App., *infra*, 9a; see also Restatement (Second) of Torts § 208(2) & comment k (1965); 3 W. Blackstone, *Commentaries* *414-417; *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194, 11 E.R.C. 628 (1603).

Sheriff, the county,[3] and others who had participated in the break-in. Petitioners alleged that respondents' actions violated their rights under the Due Process Clause of the Fourteenth Amendment and the Fourth Amendment. The due process claims against all defendants were dismissed, as were the Fourth Amendment claims against all defendants other than Hartman and the Sheriff and Deputy Sheriff in their individual capacities only. This petition challenges the dismissal of the due process claims and the dismissal of the Fourth Amendment claims against the county, the individuals in their official capacities, and the law firm.

A. The Judgment Notwithstanding the Verdict

In early 1986, Hartman and his law firm litigated a breach-of-contract claim in Oklahoma state court against the Watsons on behalf of S & T. Complaint 3; App., *infra*, 5a. The jury found for S & T but awarded a verdict of only $1. *Ibid.* The trial judge, however, granted a motion for judgment notwithstanding the verdict, awarding S & T $85,244.11 plus $16,478.97 interest and awarding the law firm $40,064.13 in attorney's fees. *Ibid.* Subsequently, the Oklahoma Court of Appeals reversed the trial court's order and reinstated the original $1 jury verdict. *S & T Gas Transmission Co. v. Watson*, No. 66528 (Okla. Ct. App. Feb. 16, 1988), cert. denied, No. 66528 (Okla. July 13, 1988).

B. The Collection Proceedings

During the pendency of petitioners' appeal, Hartman and his law firm instituted collection proceedings.

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[3] Oklahoma law provides that a county shall be sued in the name of its Board of County Commissioners. See Okla. Stat. tit. 19, § 4 (1988).

Complaint 3; App., *infra*, 5a-6a. Accordingly, on December 10, 1986, an assets hearing was held before a state trial judge, Judge Thompson, in Creek County. Complaint 3. At that hearing, petitioners refused to answer questions about certain contents of their home, claiming that this property was exempt from judgment creditors under Okla. Stat. tit. 31, § 1 (1990 Supp.). Complaint 3. Judge Thompson did not rule on that claim but ordered the hearing continued to December 17, 1986.

Before the hearing before Judge Thompson could be resumed, however, and thus before the Watsons' exemption claim was considered, Hartman obtained a writ in aid of execution from a different judge, Judge Maley, in a different county, Okmulgee County. App., *infra*, 5a-6a. An assets hearing is not a prerequisite to a writ of execution under Oklahoma law, and Oklahoma law does not require that exemption claims be adjudicated before the property at issue is seized. Thus, on December 12, 1986, Judge Maley signed a writ providing that "you are hereby commended [*sic*] to forcibly go upon the premises of said individuals and execute upon the personal property enumerated at Exhibit 'A' to this Writ." App., *infra*, 6a.

As required by statute (Okla. Stat. tit. 12, § 731 (1988)), Judge Maley "directed" the writ to Sheriff Weaver, who was then responsible for "serv[ing] and execut[ing it] according to law." Okla. Stat. tit. 19, § 514 (1988). Sheriff Weaver "order[ed]" Deputy Sheriff Newton to proceed to the Watsons' home and execute the writ. Newton Depo. 17.[4] Consistent with county policy,

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[4] "Depo." citations are to the pretrial depositions that were taken in the Section 1983 action. The district court improperly granted summary judgment to all defendants, including defendants who had not moved for summary judgment (see App., *infra*, 11a), without even waiting for all of the pretrial depositions to be transcribed.

Newton did not attempt to inform the Watsons that he would be coming. *Id.* at 23. When Newton, in the company of Hartman, arrived at the Watsons' house, there was nobody home and the premises were locked. *Id.* at 24. Newton was unsure whether the writ authorized him to break into the Watsons' house. See Weaver Depo. 19, 36.[5] Accordingly, Newton radioed in to Sheriff Weaver "for further instructions." Newton Depo. 26.

As was the "procedure" and "policy" (Weaver Depo. 10, 16), Sheriff Weaver "told [Newton] that [he] would get ahold of the district attorney * * * and see if [he] could get the answers to [Newton's] questions." Weaver Depo. 36; see also *id.* at 11, 17, 19. See generally Okla. Stat. tit. 19, § 215.5 (1988) (requiring District Attorneys to give "opinion and advice" to other county officers).[6] The District Attorney told Sheriff Weaver that Newton "could enter the dwelling house forcibly and execute it." Weaver Depo. 40. Sheriff Weaver then asked "about lawsuits," and the District Attorney replied that "you've got to do what the judge says" and that "[y]ou may get sued, but either way, you know, we've been sued before." *Ibid.*

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[5] As noted, the writ provided merely that "you are hereby commended [*sic*] to forcibly go upon the premises." The Watsons, however, live on an 80-acre tract surrounded by a high fence, and it is unclear whether the writ on its face authorized forced entry into the dwelling house or simply onto the property. See Weaver Depo. 19-23. As the district court subsequently observed, "[t]he Oklahoma statutes dealing with execution by creditors do not provide for breaking into the debtor's home." App., *infra*, 9a (citation omitted).

[6] The district court appears to have believed that Sheriff Weaver consulted only with an assistant district attorney. See App., *infra*, 10a. That belief, however, is clearly incorrect. See, *e.g.*, Weaver Depo. 19; Giulioli Depo. 4; see also note 4, *supra*.

Sheriff Weaver then "told [Newton] that [he] had talked to the district attorney * * * and that he told us to go ahead and do it." *Ibid.* See also Newton Depo. 27 (Sheriff Weaver got instructions "from the district attorney's office" and "advised me to enter the * * * dwelling").

Newton accordingly unscrewed the catch on the door and entered the Watsons' house. Newton Depo. 27-28. He and Hartman proceeded to fill two pickup trucks with personal property (Complaint 5), including guns, saddles, bridles, televisions, stereos, videocassette recorders, a microwave oven, rugs, and assorted clothing. The District Attorney then "instructed" Sheriff Weaver to hold these goods in storage "until it was settled in court." Weaver Depo. 32-33.[7] Shortly thereafter, the Watsons filed for reorganization in bankruptcy under Chapter 11.

C. Proceedings Below

Petitioners brought this action, alleging that the carrying out of the writ of execution deprived them of property without due process of law and that the breaking into their home violated their rights under the Fourth Amendment. Complaint 5. The United States District Court for the Eastern District of Oklahoma granted summary judgment in favor of all defendants. App., *infra*, 5a-7a, 8a-12a. It held first that because the deprivation of property had been postjudgment, there had been *"per se"* no denial of due process. App., *infra*, 9a. Second, it reasoned that petitioners had failed to state a cause of action

[7] After the Oklahoma Court of Appeals reinstated the original jury verdict, most – but not all – of this property was returned to the Watsons. Some of it, however, had been damaged.

for violation of the Fourth Amendment because, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), Section 1983 affords no remedy for any constitutional violation if that violation was "random and unauthorized" and if state-law remedies exist. App., *infra*, 10a & n.1. Despite the role played by the Sheriff and District Attorney, the District Court concluded that the breaking and entering alleged here was "random and unauthorized" because "no law or regulation permit[s] entry into a home in execution of a judgment" and because the District Attorney is required by state law only to provide "opinion and advice." *Id.* at 10a-11a.

The Tenth Circuit reversed only as to petitioners' Fourth Amendment claims against Weaver and Newton in their individual capacities, and against Hartman. App., *infra*, 1a-4a, 16a. Without making any determination as to whether the deprivation of property was random or unauthorized, the court of appeals held that *Parratt* bars petitioners' due process claims because Oklahoma law provides postdeprivation tort remedies. App., *infra*, 3a. It held, however, that *Parratt* does not apply to petitioners' Fourth Amendment claims, and that the case could proceed on that theory against Weaver, Newton, and Hartman. *Id.* at 3a, 16a. The court of appeals did not explain the basis for its ruling that Okmulgee County and the law firm could not be sued for violation of the Fourth Amendment. See *id.* at 3a.

REASONS FOR GRANTING THE PETITION

Petitioners have valid claims that respondents violated their rights under the Due Process Clause; that the county should be liable, and respondent individuals

should be liable in their official as well as individual capacities, for a Fourth Amendment violation that reflects the exercise of policymaking authority delegated by the county; and that respondent law firm should be liable under the Oklahoma law of respondeat superior. In rejecting each of those claims, the Tenth Circuit placed itself in conflict with the decisions of this Court, with the decisions of other courts of appeals, and with the general rule that Section 1983 incorporates relevant principles of state law. This Court should grant certiorari to consider the serious errors committed by the Tenth Circuit and the important issues of Section 1983 law raised by this case. Because one of the cases that demonstrate the errors committed below (*Zinermon v. Burch*, 58 U.S.L.W. 4223 (Feb. 27, 1990)) was decided after the Tenth Circuit ruled, the Court may wish to consider remanding for further consideration in light of that case.

I. THE TENTH CIRCUIT'S DISMISSAL OF THE DUE PROCESS CLAIMS CONFLICTS WITH THIS COURT'S DECISIONS IN *LOGAN V. ZIMMERMAN BRUSH CO.* AND *ZINERMON V. BURCH* AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Due Process Clause "usually * * * requires some kind of a hearing *before* the State deprives a person of * * * property." *Zinermon*, 58 U.S.L.W. at 4227 (emphasis in original). The necessary predeprivation hearing did not occur in this case, however. Not only was the Watsons' property physically seized in execution of a judgment that was ultimately overturned on appeal, but also the seizure took property that was exempt from execution under Oklahoma law. Despite the Watsons' valid exemption claims, Oklahoma law does not provide, and the

Watsons did not receive, any meaningful opportunity to assert those claims before their home was invaded and two truckloads of furniture and personal items, including exempt property, were carted away.

The relevant statute (Okla. Stat. tit. 31, § 1 (1990 Supp.)) provides that most furnishings and other personal belongings are "exempt from * * * execution." The Watsons in fact claimed that exemption at a preliminary assets hearing. Judge Thompson did not rule on that claim, but instead decided to consider the issue further at a continued assets hearing at a later date.

That hearing never occurred. In the interim, Hartman sought and obtained an ex parte writ of execution from Judge Maley. As required by statute, Judge Maley "directed" the writ to Sheriff Weaver. Okla. Stat. tit. 12, § 731 (1988). As similarly required, Sheriff Weaver was responsible for "serv[ing] and execut[ing it] according to law." Okla. Stat. tit. 19, § 514 (1988).[8] But Oklahoma law *nowhere* requires that the Sheriff take a claimed exemption into account in any way; instead " 'it is no part of the duty * * * of an officer holding an execution, to select and set apart the judgment debtor's exempt property.' " *Sale v. Shipp*, 160 P. 502, 504 (Okla. 1915) (quoting *Parsons v. Evans*, 145 P. 1122 (Okla. 1914)). Accordingly, Hartman and Deputy Sheriff Newton, acting on "instructions" (Weaver Depo. 32-33) from Sheriff Weaver and the District Attorney for Okmulgee County, indiscriminately

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[8] The sheriff or his deputies are additionally responsible for implementing many of the procedural safeguards provided by Oklahoma execution law. See, *e.g.*, Okla. Stat. tit. 12, §§ 756, 757, 759, 811 (1988).

seized the contents of the Watsons' home without regard to their earlier objections.

The Tenth Circuit determined that this Court's decision in *Parratt v. Taylor, supra,* precluded any Section 1983 liability in this case for denial of due process. App., *infra,* 3a. In *Parratt,* the Court held that a "random and unauthorized" deprivation of property does not constitute a due process violation if a postdeprivation state remedy is available. 451 U.S. at 541. Without making any express determination that the events described above were in fact "random and unauthorized," the court below dismissed petitioners' due process claims simply because "an adequate state law remedy" existed. App., *infra,* 3a.[9]

The Tenth Circuit's interpretation of *Parratt* is indefensible in light of two of this Court's subsequent cases clarifying that decision. The court of appeals failed to recognize that a property deprivation undertaken pursuant to an established state procedure – which is the case here – cannot be excused from due process scrutiny on the ground that the State also provides a postdeprivation remedy. The court also did not determine – and could not properly have determined – that the deprivation of petitioners' property was "random and unauthorized."

A. To begin with, the decision below ignores the teachings of *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982). In that case, the Court allowed a due process

[9] The district court held that no due process violation had occurred because the execution was postjudgment. App., *infra,* 9a. But this misses the point of petitioners' claim – by virtue of Okla. Stat. tit. 31, § 1 (1990 Supp.), the Watsons have a right to retain much of the property seized despite the previous judgment against them.

challenge to a statutory scheme that permitted a complainant to assert a property interest before a state agency and required the agency to act within a stated period of time, but extinguished that property interest if the agency for any reason let the period run without acting. The Court rejected the proposition that *Parratt* applied to such a challenge: "[u]nlike the complainant in *Parratt*, Logan is challenging not [a random and unauthorized act by a state employee], but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." 455 U.S. at 435-436 (quoting *Parratt*, 451 U.S. at 541).

Like the due process violation in *Logan*, the violation in this case arises from an "established state procedure." Oklahoma has created an entitlement by providing that certain property is exempt from executions but has established no procedures by which the owner can assert that entitlement before the property is seized. See p. 10, *supra*. Thus, it is established procedure in the State for overbroad execution on a judgment to occur, with the valid exemptions available only for later assertion. This lawsuit calls that established procedure into question, yet the lawsuit has been dismissed on the nonsensical ground – contrary to *Logan* – that the availability of postdeprivation remedies removes the need even to consider the constitutionality of the absence of any predeprivation remedies.

If the Tenth Circuit meant to rule, sub silentio, that the deprivation in this case did not result from an "established state procedure," then it put itself into conflict with the decisions of other courts of appeals. In cases much closer than this one, those courts have held that a due process violation is attributable to an "established

state procedure" whenever predeprivation process is feasible or practical. For example, in *Augustine v. Doe*, 740 F.2d 322, 327-329 (5th Cir. 1984), the court reversed a grant of summary judgment in favor of deputy sheriffs and others who allegedly had deprived the plaintiff of procedural due process by arresting and detaining him without probable cause and taking his dog. The court held that the "controlling question" was whether the State was in a position to provide predeprivation procedures (*id.* at 327) and that, if it was, then the deprivation could be ascribed to an "established state procedure" within the meaning of *Logan* (*id.* at 329). See also *Thibodeaux v. Bordelon*, 740 F.2d 329, 336 (5th Cir. 1984). Likewise, in *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir. 1983), the court reinstated a procedural due process claim brought by a plaintiff who alleged that buildings she owned had been demolished without prior compliance with the Administrative Code of the City of New York. The district court had dismissed the due process claim on the basis of *Parratt*, but the court of appeals held that the "established state procedure" analysis derived from *Logan* was more appropriate because "decisions made by officials with final authority over significant matters, which contravene the requirements of a written * * * code, can constitute established state procedure." *Id.* at 988.

Consistent with those decisions of the Second and Fifth Circuits, other federal appellate decisions have held that the *Logan* "established state procedure" analysis is applicable whenever predeprivation process is feasible. See *Rittenhouse v. DeKalb County*, 764 F.2d 1451, 1455 (11th Cir. 1985) ("we conclude that the rationale underlying the 'established state procedure' exception is that where a

deprivation occurs pursuant to an established state procedure, predeprivation process is ordinarily feasible"), cert. denied, 475 U.S. 1014 (1986); *McClary v. O'Hare*, 786 F.2d 83, 87 (2d Cir. 1986) ("*Parratt's* 'established state procedure' exception was intended to apply only where the procedure deprives the claimant of predeprivation process it would otherwise be possible to provide"); see also *Greco v. Guss*, 775 F.2d 161, 171 (7th Cir. 1985).

In this case, predeprivation process was certainly feasible. Indeed, the State was in the midst of providing it when the writ of execution was issued. Moreover, in this case, as in *Burtnieks*, those who have the responsibility under Oklahoma law for carrying out writs of execution are permitted and even encouraged to make decisions that take property in direct contravention of the State's written code. Thus, under the interpretation of *Logan* that prevails in other circuits, petitioners would be able to proceed with a Section 1983 action.

B. The inapplicability of *Parratt* to this case is confirmed by this Court's intervening decision in *Zinermon v. Burch*. Because the Tenth Circuit did not have the benefit of the *Zinermon* decision when it ruled, this Court may wish to grant the petition, vacate the judgment below, and remand for reconsideration in light of that case.

Zinermon involved the issue in between those resolved in *Parratt* and *Logan*: whether a Section 1983 action exists for due process violations when the state procedure was not itself "inadequate to ensure due process" but when the State nonetheless had given officials "broadly delegated, uncircumscribed power to effect the deprivation at issue." 58 U.S.L.W. at 4230. The Court held that a Section 1983 action can be maintained in that intermediate situation. It reasoned that the State by definition

cannot predict when a "random and unauthorized" deprivation such as that in *Parratt* will occur; therefore, *Parratt* "represent[s] a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." 58 U.S.L.W. at 4228 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). By contrast, when "predeprivation procedural safeguards *could* address the risk of deprivations of the kind * * * allege[d]," the *Parratt* rule does not apply. *Id.* at 4229 (emphasis added).

The Court identified three characteristics indicating why predeprivation process would have been effective. First, the deprivation was foreseeable – "[a]ny erroneous deprivation w[ould] occur, if at all, at a specific, predictable point in the * * * process." 58 U.S.L.W. at 4230. Second, predeprivation process was not "impossible." *Ibid.* Third, the officials' actions were authorized – "[t]he State delegated to them the power and authority to effect the very deprivation complained of * * * and also delegated to them the concomitant duty to initiate the [relevant] procedural safeguards." *Ibid.*

Even if the violation alleged here did not arise from an established state procedure, it plainly involves the sort of deprivation by officials acting pursuant to delegated power that "predeprivation procedural process could address." As in *Zinermon*, the deprivation was foreseeable – it would occur, if at all, when a writ of execution was served after an exemption was claimed. Similarly, predeprivation process was possible; in fact, the State was in the middle of providing a hearing when the deprivation occurred. And last, Oklahoma authorized the Sheriff's actions by delegating him the responsibility to "serve and

execute" the writ (Okla. Stat. tit. 19, § 514 (1988)) and to administer the procedural safeguards set up by state law (see note 8, *supra*).

The Court recently has vacated the judgments, and remanded for reconsideration in light of *Zinermon*, in two Section 1983 actions in which allegations of due process violations by high-ranking officials acting pursuant to broadly delegated authority had been dismissed on the basis of *Parratt*. See *Easter House v. Felder*, 879 F.2d 1458 (7th Cir. 1989) (en banc), vacated, 58 U.S.L.W. 3564 (March 5, 1990); *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988), vacated, 58 U.S.L.W. 3564 (March 5, 1990). The Court should, at a minimum, do likewise here.

II. THE TENTH CIRCUIT'S PARTIAL DISMISSAL OF THE FOURTH AMENDMENT CLAIMS, WITHOUT ADEQUATE CONSIDERATION OF THE ABILITY OF RESPONDENT OFFICIALS TO SET COUNTY "POLICY," IS INCORRECT AND RAISES ISSUES THAT ARE BADLY IN NEED OF CLARIFICATION BY THIS COURT.

Although a local government may not be subjected to vicarious liability under Section 1983 "for an injury inflicted solely by its employees or agents," it is well settled that it may be held accountable for a constitutional tort attributable to its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978); accord *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121-122 (1988) (plurality opinion). Such a "policy or custom" can manifest itself in several ways. See, *e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-481 (1986) (written rule or regulation); *Monell*, 436 U.S. at 661 n.2 (same); *City of Canton v. Harris*,

109 S. Ct. 1197, 1204 (1989) (inadequate supervision of employees); *Praprotnik*, 485 U.S. at 127 (plurality opinion) ("a widespread practice that, although not authorized by written law * * *, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law' ").

This case concerns the situations in which official policy may flow from "a single decision to take unlawful action made by * * * the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-484 (plurality opinion); accord *Jett v. Dallas Independent School Dist.*, 109 S. Ct. 2702, 2723 (1989); *Praprotnik*, 485 U.S. at 124 (plurality opinion). Last Term, the Court achieved a consensus on the *method* by which lower courts are to determine whether such actions may subject the local government to Section 1983 liability; thus, it is now clear that whether the official was delegated the required "final policymaking authority" with respect to the challenged action is "a legal question to be resolved by the trial judge" on the basis of state law "*before* the case is submitted to the jury." *Jett*, 109 S. Ct. at 2723 (emphasis in original).

But the Court has not provided clear guidance on the question of *what* may constitute "final policymaking authority" in the first place, beyond stating that it is a matter of state law (see, *e.g.*, *Jett*, 109 S. Ct. at 2723). In *Pembaur*, for example, a five-Justice majority agreed that a county prosecutor authorized to give "instructions" was a final policymaker, but implied that its conclusion might have been different had the prosecutor given only "legal advice." 475 U.S. at 484-485.[10] Similarly, in *Praprotnik*,

[10] Moreover, one member of the majority opined that the prosecutor would not have had the requisite authority to set

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seven Justices agreed that a municipal employee did not have final policymaking authority, but disagreed over the rationale. Compare 485 U.S. at 130 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) (focusing on existence of procedures for review) with 485 U.S. at 138-139, 141 & n.4 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in the judgment) (disagreeing with the plurality's view of the effect of procedures for review and arguing instead that no final policymaking authority was delegated to the employee in question because many other municipal employees had similar power). Most recently, in *Jett*, the Court declined to reach the question at all. See 109 S. Ct. at 2724. As one lower court recently lamented, "[i]t is clear that we simply have no definitive holding upon which to rely in deciding where to look for the placement of policymaking authority." *City of Houston v. DeTrapani*, 771 S.W.2d 703, 707 (Tex. Ct. App. 1989).

In the absence of guidance from this Court, the lower courts have come into conflict over which local officials are "final policymakers." And because local officials – but not local governments – are frequently shielded from monetary liability by qualified immunity (see, *e.g.*, *Owen v. City of Independence*, 445 U.S. 622 (1980)), the latter have a powerful incentive to shift de facto decisionmaking

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government policy had the unconstitutionality of his "instructions" been settled at the time. 475 U.S. at 486 (White, J., concurring). Another member stated his view that policymaking authority is not necessary for governmental liability because the aspect of *Monell* that rejected vicarious liability was wrongly decided. *Id.* at 489 (Stevens, J., concurring in part and concurring in the judgment).

power down the bureaucratic ladder while adopting no written policy or retaining on the books a "precatory admonition" against unconstitutional action. See *Praprotnik*, 485 U.S. at 145 n.7 (Brennan, J., concurring in the judgment); cf. *id.* at 130-131 (plurality opinion). In that way, the local government might be able to dissociate itself from its employee's actions, thereby most probably leaving the plaintiff without a federal remedy.

The decision below provides an example of this unfair phenomenon. Without providing any reason, the Tenth Circuit simply dropped Okmulgee County from the case (App., *infra*, 3a), even though its Sheriff and District Attorney instructed one of its Deputy Sheriffs to break into the Watsons' home and seize much of its contents, and even though their decision on the matter was not subject to any higher review by county authorities. The Court should grant the petition for a writ of certiorari to clarify further the circumstances in which a local government may be held accountable for constitutional violations committed at the behest of its officials acting pursuant to delegated authority.

A. The Tenth Circuit's Disposition Is Inconsistent with this Court's Decision in *Pembaur*.

In *Pembaur*, this Court held that a local government official exercised final policymaking authority and that the local government was therefore liable for his actions on facts almost identical to those presented here. There, county deputy sheriffs attempted to serve capiases for the arrest of third parties at Pembaur's office. See 475 U.S. at 472. Pembaur refused to let the deputies in, and they called their supervisor for instructions. See *id.* at 472-473.

The practice in the Sheriff's Department was to refer questions concerning the service of capiases to the county prosecutor for "instructions." 475 U.S. at 473. That practice was founded on a state statute providing that county officers may " 'require . . . instructions from [the County Prosecutor] in matters connected with their official duties.' " *Id.* at 485 (quoting Ohio Rev. Code Ann. § 309.09(A) (1979)). Accordingly, the supervisor told the deputies to contact the County Prosecutor's office and follow its "instructions." *Id.* at 473. This, the Sheriff later testified, "was the proper thing to do." *Id.* at 475. The County Prosecutor and his assistant "instruct[ed] the Deputy Sheriffs to 'go in and get [the witnesses].' " 475 U.S. at 473. Accordingly, the deputies broke down the door and entered. *Ibid.* This Court subsequently held in another case that such a search violates the Fourth Amendment. See *id.* at 474.

The Court concluded that the county could be held liable for the prosecutor's decision. Looking to the state law and the Sheriff's stated practice, the Court held that the prosecutor's instructions represented official policy because "[i]n ordering the Deputy Sheriffs to enter petitioner's [office] the County Prosecutor was acting as the final decisionmaker for the county." 475 U.S. at 485.[11]

If anything, this case presents an even stronger case for a finding of "final policymaking authority" than did

[11] The Court rejected the county's argument that the prosecutor was not acting as a final policymaker because he was giving only "legal advice." It did not decide whether the giving of such advice could constitute policymaking, but determined instead – based on the state statute and the Sheriff's practice – that the prosecutor's decision was more "command[]" than advice. 475 U.S. at 484.

Pembaur. When Deputy Sheriff Newton found the Watsons' door locked and no one home, he called Sheriff Weaver "for further instructions." Newton Depo. 26. Sheriff Weaver then invoked his "policy" (Weaver Depo. 16) in such situations – "get[ting] ahold of the district attorney * * * and see[ing] if I could get the answers." *Id.* at 36; see also *id.* at 10-11, 17, 19 (discussing the Sheriff's procedure of going to the District Attorney for "instructions" and "advice"). The District Attorney told Sheriff Weaver that Newton "could enter the dwelling house forcibly and execute" the writ (*id.* at 40), and the Sheriff then "told [Newton] that [he] had talked to the district attorney * * * and that he told us to go ahead and do it." *Ibid.*; see also Newton Depo. 27 (Sheriff Weaver got instructions "from the district attorney's office" and "advised me to enter the * * * dwelling").

Thus, as in *Pembaur*, the Sheriff had a practice of requesting – and following – the local prosecutor's instructions on how to serve process. And Oklahoma law, like Ohio law, contemplates such a relationship, providing that "[t]he District Attorney * * * shall give opinion and advice to * * * civil officers * * * relating to the duties of such * * * officers." Okla. Stat. tit. 19, § 215.5 (1988).[12]

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[12] The district court sought to distinguish *Pembaur* on the ground that the Ohio statute used the term "instructions" instead of "opinion and advice," and that the *Pembaur* Court implied that "legal advice" by the prosecutor might not have bound the county. App., *infra*, 11a. Whatever the propriety of making recovery under Section 1983 turn on such metaphysics, Sheriff Weaver's and Deputy Sheriff Newton's testimony make clear that their policy was to regard what the District Attorney told them as far more than mere "advice." See pp. 6-7,

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Consequently, Okmulgee County may properly be held liable for the District Attorney's actions.

But equally important, and as was not the case in *Pembaur*, the *Sheriff* also "advised [Newton] to enter the * * * dwelling." Newton Depo. 27. Under Oklahoma law, the county Sheriff is explicitly charged with "serv[ing] and execut[ing] * * * all process, writs * * * and orders." Okla. Stat. tit. 19, § 514 (1988). The Sheriff is thus expressly authorized to "act[] as the final decisionmaker for the county" with respect to service of process, and his actions therefore represent official county policy. *Pembaur*, 475 U.S. at 485; see also *Praprotnik*, 485 U.S. at 127 (plurality opinion) (officials with "authority to make *final* policy" may "make municipal policy") (emphasis in original).

B. The Circuits Are in Conflict Regarding Whether Sheriffs and Prosecutors Exercise Policymaking Authority in Carrying Out Their Law Enforcement Responsibilities.

"Identifying the official policymakers has been an intellectual fork along the path of development of section 1983 jurisprudence." *Hammond v. County of Madera*, 859 F.2d 797, 802 (9th Cir. 1988). The Tenth Circuit's disposition of this case reflects the truth of that observation. It adds to a disagreement among the circuits with respect to governmental liability for the constitutional violations committed by sheriffs and local prosecutors during the course of their law enforcement activities. The division

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supra. In such situations, "[t]he delegation of authority [should not be overlooked] by disingenuously labeling the Prosecutor's clear command mere 'legal advice.' " *Pembaur*, 475 U.S. at 485.

over this frequently recurring issue warrants this Court's review.

At least four circuits have held that a Sheriff or prosecutor has final policymaking authority with respect to law enforcement. See *Crowder v. Sinyard*, 884 F.2d 804, 827-829 (5th Cir. 1989) (county liable for sheriff's authorization of an unconstitutional search and seizure); *Gobel v. Maricopa County*, 867 F.2d 1201, 1206-1209 (9th Cir. 1989) (county could be held liable for district attorney's decisions as to warrant procedure); *Weber v. Dell*, 804 F.2d 796, 803 (2d Cir. 1986) (county liable for sheriff's policy of strip searches of inmates); *Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) (county liable for sheriff's policy of strip searches of visitors); *Crane v. Texas*, 759 F.2d 412, 430 (5th Cir.) (county liable for district attorney's institution of unconstitutional capias procedures), modified on other grounds, 766 F.2d 193, cert. denied, 474 U.S. 1020 (1985). See also *Meade v. Grubbs*, 841 F.2d 1512, 1530 (10th Cir. 1988) (Oklahoma county liable for sheriff's alleged approval of use of physical force on inmates), cert. denied, 483 U.S. 1020 (1987); *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988) (county liable for sheriff's violence towards inmates); *Haynesworth v. Miller*, 820 F.2d 1245, 1274 (D.C. Cir. 1987) (city could be held liable for retaliatory prosecution by district attorneys). By contrast, in addition to the court below, the Sixth Circuit has refused to ascribe a police chief's actions to the local government he served, reasoning that there was "[n]o evidence that [he] possessed any final authority to establish municipal policy." *Frost v. Hawkins County Bd. of Educ.*, 851 F.2d 822, 828-829 (no county liability for allegedly unconstitutional arrest by sheriff), cert. denied, 109 S. Ct. 529 (1988).

Of course, as the inquiry is one of state law (*Jett*, 109 S. Ct. at 2723), each case is somewhat dependent on the state statutes at issue. But the lower courts have drawn different conclusions from similar governmental arrangements. Three circuits, for example, have inferred policymaking authority on the basis of the sheriff's or the prosecutor's status as an elected official. See *Gobel*, 867 F.2d at 1208 (citing cases). In this case, however, the Tenth Circuit refused to subject Okmulgee County to liability for Sheriff Weaver's actions, even though he is an elected representative of the County, see Okla. Stat. tit. 19, § 131 (1990 Supp.). Other courts have found it significant that state law provides no higher review of the police procedures used by the Sheriff. See *Sinyard*, 884 F.2d at 828; *Weber*, 804 F.2d at 803; see also *Meade*, 841 F.2d at 1530. Again in contrast, the court below implicitly found irrelevant Sheriff Weaver's assigned role in this regard.[13] Moreover, the Sixth Circuit, like the court below, appears to have adopted a definition of what may qualify as a "policy" that is inconsistent with that employed elsewhere. Compare *Frost*, 851 F.2d at 828-829 (one-time arrest does not qualify as a policy), with, *e.g.*, *Sinyard*, 884 F.2d at 807, 828 (one-time search and seizure was an

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[13] The decision below is therefore inconsistent with the Fifth Circuit's recent *Sinyard* decision in particular. That case similarly involved a sheriff's instructions that his subordinates break into the plaintiffs' office and seize their personal property. The Fifth Circuit held that the county was properly subjected to liability because "[u]nder Arkansas law, a county sheriff, in the execution of the statutory duty to perform law enforcement activities in and for the county, is solely responsible for the procedures and practices of the department; there is no legislative or other higher body, beyond a court of law, to which the sheriff answers." 884 F.2d at 828 (citation omitted).

official county policy). Cf. *Pembaur*, 475 U.S. at 483 (plurality opinion) (government policy can consist of a "single decision"). Because of the sharp division among the lower courts, with most courts disagreeing with the standard applied below, review by this Court is appropriate.

C. Defining the Proper Contours of "Final Policymaking Authority" Is an Important Issue that Should Be Addressed by this Court.

As the plurality in *Praprotnik* recognized, "special difficulties can arise" when a plaintiff contends that policymaking authority has been delegated to a governmental official. 485 U.S. at 126. To begin with, this Court's decision in *Monell* that local governments may not be held vicariously liable gives those governments a considerable incentive to attempt to place the responsibility for injuries onto its employees. "If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose." *Praprotnik*, 485 U.S. at 126 (plurality opinion).

Moreover, decisions such as the one below threaten to eliminate "the uniquely federal remedy" (*Mitchum v. Foster*, 407 U.S. 225, 239 (1972)) offered by Section 1983. As noted above, the employees to whom governments may try to shift the blame are often shielded from any monetary liability by qualified immunity. See, *e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Were the governments to succeed, the "damages remedy against the offending party [which] is a vital component of [Section 1983]" would thus be effectively negated. *Owen*, 445 U.S. at 651.

On the other side of the coin, too expansive a conception of "policymaking authority" would threaten to blur the line between governmental liability for "official policy" and governmental policy for respondeat superior, and would thus violate Congress' intent as interpreted in *Monell*. See 436 U.S. at 691-693. In addition, more predictability in this area would have a salutary effect on local governments: it would permit them to arrange their affairs so as to avoid making "municipal governance into a hazardous slalom through [unforeseeable] constitutional obstacles" and thereby to confine a "severe limitation on their ability to serve the public." *Owen*, 445 U.S. at 665, 670 (Powell, J., dissenting).

Last, the significant number of cases involving this issue that this Court has heard in recent years itself demonstrates the issue's importance. The blind eye turned by the Tenth Circuit to this Court's precedents – and the extremely restrictive view it took of government liability for actions pursuant to delegated authority – should not be sanctioned without plenary review by this Court.[14] The Court should grant the petition to resolve the conflict among the circuits and to elucidate further the principles controlling governmental liability for the actions of its officials.

III. THE TENTH CIRCUIT'S CONCLUSION THAT HARTMAN'S LAW FIRM MAY NOT BE HELD LIABLE FOR HIS ACTIONS ILLEGITIMATELY SUPPLANTS OKLAHOMA PARTNERSHIP LAW.

The Tenth Circuit's improper limitation of the federal remedy available to petitioners was not limited to the

[14] Of course, the same reasons requiring the reinstatement of Okmulgee County also require that the suit be allowed to proceed against the officers in their official capacities. See, *e.g.*, *Brandon v. Holt*, 469 U.S. 464, 471-472 (1985).

government defendants; in addition, it refused to let the suit proceed under any theory against the law firm of which Hartman is a partner and on behalf of whose client Hartman was acting. Under Section 13 of the Uniform Partnership Act, which has been enacted without change as Okla. Stat. tit. 54, § 213 (1969), a law partnership is liable for the torts of one of its partners if that tort occurred in the ordinary course of the firm's business. The Tenth Circuit's implicit belief that this general rule does not apply in Section 1983 actions is unjustified and independently warrants correction by this Court.

It is of course clear that a *government* entity may not be held liable under Section 1983 on the basis of respondeat superior. See, *e.g.*, *Monell*, 436 U.S. at 691. However, the Court has never held or intimated that a *private* entity cannot be vicariously liable in a suit brought under the Civil Rights Acts when state agency law indicates that it should be so liable.

A. In *Monell*, the Court held that the Forty-second Congress did not intend to *create* a "federal law of *respondeat superior*" holding local governments accountable for the acts of their employees. 436 U.S. at 693. Although the Court did note that Section 1983's focus on persons who "subject, or cause to be subjected," another person to a deprivation of a constitutional right "cannot be easily read to impose liability vicariously," it primarily relied on legislative history indicating that Congress in 1871 was unsure of the constitutionality of imposing such liability on government entities. *Id.* at 691-693 & n.57; see also *Jett*, 109 S. Ct. at 2710-2722 (rejecting the argument that 42 U.S.C. § 1981 – which does not contain the language "subject, or cause to be subjected" – creates a federal law

of respondeat superior liability on the basis of this legislative history). However, the opinion in *Monell*, the language of Section 1983, and the legislative history of the statute say *nothing* to suggest that Congress did not mean to incorporate *state* vicarious liability law into Section 1983, a result that would never have raised constitutional objections.[15]

B. In situations where the language and history of Section 1983 are silent, this Court has held that it *does* incorporate state and common law principles, for "[i]t is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). In the context of immunities from Section 1983 liability, for example, "[o]ne important assumption underlying the Court's decisions * * * is that members of the 42d Congress were familiar with common-law principles * * * *and that they likely intended these common-law principles to obtain*, absent specific provisions to the contrary." *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2309 (1989) (quotation omitted) (emphasis added). Thus, although Section 1983's language makes "no mention * * * of * * * immunities," the Court has on many occasions read preexisting common law immunities into its provisions. *Owen*, 445 U.S. at 635-639 (citing cases). It is equally "likely" that Congress "intended the[] common-law principles" of respondeat superior "to obtain."

Moreover, 42 U.S.C. § 1988 expressly instructs federal courts to fill in any deficiencies in the federal civil rights

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[15] The law of respondeat superior of course antedates the Civil Rights Acts. See, *e.g.*, 5 F. Harper, F. James & O. Gray, *The Law of Torts* § 26.2 (2d ed. 1986).

laws by looking to state and common law, so long as these are not inconsistent with the federal policies. See, *e.g.*, *Robertson v. Wegmann*, 436 U.S. 584, 588-591 (1978). There can be no suggestion that private vicarious liability pursuant to state law is inconsistent with Section 1983's deterrent and compensatory goals.

C. Significantly, the Court has expressly reserved the question whether private entities may be vicariously liable under state and common law principles in suits brought under other provisions of the Civil Rights Acts. See *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391-395 (1982) (denying vicarious liability in Section 1981 actions against a private entity, "[o]n the assumption that *respondeat superior* applies," because there was no evidence of an agency relationship). In the aftermath of *General Building Contractors*, the Fifth Circuit – expressly noting the distinction between holding public and private entities vicariously liable – has held that respondeat superior does apply in Section 1981 actions against private parties. See *Flanagan v. Aaron E. Henry Community Health Services Center*, 876 F.2d 1231, 1235 (1989). And as the Fifth Circuit noted, five other circuits have imposed liability vicariously on private entities in suits brought under Section 1981. See *ibid.* (citing cases). The liabilities imposed by Sections 1981 and 1983 are interrelated and should be construed with that in mind (see *Jett*, 109 S. Ct. at 2720-2721), and therefore these Section 1981 decisions are inconsistent with the Tenth Circuit's approach. This Court should grant the petition to correct the misconstruction of Section 1983 by the court below and to resolve the inconsistency in the interpretation of the different provisions of the Civil Rights Acts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 1990

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLF, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolf, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolf and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796
(D.C. No. 87-412-C)
(E.D. Okla.)

(Filed Aug 3, 1989)

ORDER AND JUDGMENT*

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiffs-appellants appeal the district court's orders and judgments of September 27, 1988, entering summary judgment in favor of each of the defendants. Plaintiffs[1] instituted the underlying action pursuant to 42 U.S.C. § 1983 for violations of their fourth and fifth amendment rights when certain defendants forcibly entered their home and seized their property, pursuant to a writ issued in aid of execution.

We review the grant or denial of summary judgment *de novo*, applying the same standard as the district court

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

[1] The original plaintiffs in this action consisted of Mr. and Mrs. Watson and their minor son, Brian. During the pendency of the district court case, Mr. and Mrs. Watson filed bankruptcy and the trustee of their estate substituted for them as a party plaintiff. In addition, Brian reached the age of majority.

under Fed. R. Civ. P. 56(c). *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988).

Based upon our review of the record on appeal and the parties' briefs, we conclude that under no theory should plaintiffs' case proceed against any defendants other than Andrew S. Hartman, Bill Weaver, and Tom Newton. Therefore, the district court properly entered summary judgment in favor of the other defendants.

The district court entered summary judgment in favor of Messrs. Hartman, Weaver, and Newton on the grounds that plaintiffs had an adequate state law remedy for their alleged injuries, relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). While *Parratt* may apply to plaintiffs' due process claims under the fifth amendment, it does not apply to plaintiffs' claims for unreasonable search and seizure under the fourth amendment. *See Lavicky v. Burnett*, 758 F.2d 468, 472 n.1 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *King v. Massarweh*, 782 F.2d 825, 827 (9th Cir. 1986); *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 872 (7th Cir. 1983).

Since the district court incorrectly applied *Parratt* to plaintiffs' fourth amendment claim, we must reverse the court's entry of summary judgment in favor of Messrs. Hartman, Weaver, and Newton and remand the action so that the court may consider plaintiffs' claim in the first instance. In so doing, we express no opinion as to the merits of plaintiffs' claim.

Plaintiffs argue on appeal that their fifth amendment claim is so intertwined with their fourth amendment

claim that they should be permitted to proceed in federal court on both claims, rather than having their fifth amendment claim dismissed due to adequate state remedies. On remand, the district court should consider plaintiffs' fourth amendment claim on its own and as it may be intertwined with the fifth amendment claim.

The judgment of the United States District Court for the Eastern District of Oklahoma is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this order and judgment. The mandate shall issue forthwith.

Entered for the Court

Stephen H. Anderson
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

RICHARD C. LERBLANCE, Bankruptcy Trustee, and BRIAN HARJO WATSON,	)	No. 87-412-C
Plaintiff,	)	(Filed Sept. 27, 1988)
vs.	)	
BILL WEAVER, et al.,	)	
Defendants.	)	

ORDER

Now before the Court for its consideration is the motion of defendant Board of Commissioners of Okmulgee County (the Board) for summary judgment.

In March, 1986, defendant S & T Gas Transmission Company, Inc. (S&T), obtained a jury verdict against M. Frank Watson and Betty L. Watson (original plaintiffs in the case at bar, now substituted for by the trustee in their bankruptcy action), in the District Court of Creek County in the sum of $1.00. The trial judge, Judge John Maley, set the verdict aside the entered judgment notwithstanding the verdict in favor of S&T in the amount of $85,244.11 plus interest. Also awarded were $40,064.13 in attorney fees in favor of the law firm of Barkley, Rodolf, White & Hartman (Barkley, Rodolf). The Watsons appealed the entry of judgment to the Supreme Court of Oklahoma in May, 1986. Apparently, no supersedeas bond was posted.

On or about December 12, 1986, attorney Andrew S. Hartman (Hartman) obtained an *ex parte* writ of execution

from Judge Maley. The writ was delivered to defendant Bill Weaver, Sheriff of Okmulgee County, where property owned by the Watsons was located. The writ provided in pertinent part that "you are hereby commended [sic] to forcibly go upon the premises of said individuals, to enter the premises of said individuals and execute upon the personal property enumerated at Exhibit 'A' to this Writ." Hartman, Deputy Sheriff Tom Newton (Newton), and the anonymous John and Jane Doe, proceeded to the Watsons' home. Upon finding it locked, Newton sought guidance from the Okmulgee District Attorney, who told Newton to enter the house. The house was forcibly entered and property of the plaintiffs was taken from the dwelling. The plaintiffs, the bankruptcy trustee and the original plaintiffs' son, bring this action under 42 U.S.C. § 1983.

The United States Court of Appeals for the Tenth Circuit has recently addressed "supervisory liability" under Section 1983. The court stated:

> "A supervisor is not liable under section 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or discretion, or his failure to supervise.'" To be liable, a superior must have "participated or acquiesced in the constitutional deprivations of which complaint is made." A supervisor or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable. . . . Unless a supervisor has established or utilized an unconstitutional policy or custom, a

> plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation.
>
> *Meade v. Grubbs*, 841 F.2d 1512, 1527-28 (10th Cir. 1988) (citations omitted).

The plaintiffs have made no showing of any "affirmative link" between the Board and the actions of which complaint is made. The Board is not responsible for the training of the County's law enforcement officers. *See Meade*, 841 F.2d at 1528. Nor has there been a showing of an unconstitutional policy or custom within Okmulgee County. The Court must conclude that there is no genuine issue of material fact regarding the Board's liability.

It is the Order of the Court that the motion of the Board of Commissioners of Okmulgee County for summary judgment is hereby GRANTED.

IT IS SO ORDERED this 27th day of September, 1988.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

RICHARD C. LERBLANCE, Bankruptcy Trustee, and BRIAN HARJO WATSON, Plaintiffs, vs. BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., a Oklahoma corporation; JOHN DOE; JANE DOE; and BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA, Defendants.	)	No. 87-412-C (Filed Sept. 27, 1988)

ORDER

Now before the Court for its consideration is the motion for summary judgment of all defendants, with the

exception of Bill Weaver, Tom Newton, the anonymous John Doe and Jane Doe, and the Board of Commissioners of Okmulgee County. The factual basis of this action has been described in a companion Order.

The movants assert two bases for the entry of judgment in their favor: (1) the existence of adequate state remedies, and (2) qualified immunity. Because the Court finds the first basis dispositive, the other basis will not be addressed. In a series of decisions, the most recent being *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), the United States Supreme Court has addressed the application of §1983 within the debtor-creditor context. However those cases have dealt with due process requirements regarding garnishment actions and *prejudgment* attachments. "Of course, once the creditor has established his claim through a trial, the debtor has been accorded due process of law and the state may aid the creditor to enforce his judgment." 2 R.Rotunda, J.Nowak & J.Young, *Treatise on Constitutional Law: Substance and Procedure*, §17.9 at 285 (1986). Therefore, the taking of plaintiffs' property *per se* does not constitute a constitutional violation.

The Oklahoma statutes dealing with execution by creditors, 12 O.S. §§731, *et seq.*, do not provide for breaking into the debtor's home in order to secure the property in question. The issue to be resolved is whether the actions taken permit liability under §1983. In *Parratt v. Taylor*, 451 U.S. 527 (1981), the Supreme Court held that when deprivations of property are effected through random and unauthorized actions of state employees and the state provides an adequate post-deprivation remedy, the requirements of due process are satisfied and the plaintiff

may not maintain a §1983 action. *See also Hudson v. Palmer*, 468 U.S. 517 (1984) (extending the reasoning of *Parratt* to an unauthorized and intentional deprivation of property by a state employee).[1] The Court must determine if the actions in question were random and unauthorized or pursuant to a challenged state statute, regulation or established procedure.

The Court has concluded that there is no genuine issue of material fact as to whether the conduct complained of was random and unauthorized rather than in accordance with established state procedures. There is no law or regulation permitting entry into a home in execution of a judgment. While the law officer allegedly relied upon advice of an assistant district attorney for the county, there has been no showing that this is official county policy. A single decision by policymakers may constitute such a policy under appropriate circumstances. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). One may be found responsible for final policymaking authority through (1) legislative enactment, or (2) delegation by an

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[1] The Court is aware that some courts have found *Parratt* inapplicable to violations of the Fourth Amendment. *See, e.g., Augustine v. Doe*, 740 F.2d 322, 325-27 (5th Cir. 1984). The Supreme Court has stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). However, the United States Court of Appeals for the Tenth Circuit has not adopted the Fourth Amendment "exception" to the *Parratt* analysis, and this Court is aware of no decision applying the exception in this context. This Court declines to do so.

official possessing such authority. There has been no evidence presented of delegation. As for legislative enactment, 19 O.S. §215.5 provides as follows:

> The District Attorney or his assistants shall give opinion and advice to the board of county commissioners and other civil officers of his counties when requested by such officers and boards, upon all matters in which any of the counties of his district are interested, or relating to the duties of such boards or officers in which the state or counties may have an interest.

Under the terms of this statute, it appears that any statements made by an assistant district attorney constitute "legal advice" rather than official county policy. In *Pembaur, supra* the Supreme Court indicated that mere "legal advice" is not grounds for reliability. 475 U.S. at 484-85.

Oklahoma law provides causes of action for trespass and wrongful levy. *See Fairlawn Cemetery Ass'n v. First Presbyterian Church,* 496 P.2d 1185 (Okla. 1972) *and Farris v. Castor,* 99 P.2d 900 (Okla. 1940). The Court believes that the plaintiffs therefore have adequate state remedies by which they may seek redress for the alleged wrongful conduct.

Defendants Weaver and Newton have not moved for summary judgment. However, under the Court's analysis no §1983 is maintainable against them either. Accordingly, judgment shall be entered in their favor as well.

It is the Order of the Court that the motion of the defendants for summary judgment is hereby GRANTED.

It is the further Order of the Court that judgment is hereby entered *sua sponte* in favor of defendants Bill Weaver and Tom Newton.

IT IS SO ORDERED this 27th day of September, 1988.

/s/ H. Dale Cook
H. DALE COOK
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796

(Filed Nov. 28, 1989)

ORDER

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

This mater is before the court on the petition for rehearing filed by appellee Andrew S. Hartman.

The materials submitted by appellee have been reviewed by the members of the hearing panel, who conclude that the directions on remand in the original disposition should be modified to clarify that appellants may not proceed on their due process claim. Accordingly, the petition is GRANTED, the mandate is recalled, and the original order and judgment is MODIFIED to reflect that on remand the district court should consider only appellants' fourth amendment claim.

The mandate shall issue forthwith.

Entered for the Court

ROBERT L. HOECKER, Clerk

By/s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

M. FRANK WATSON; BETTY L. WATSON; BRIAN HARJO WATSON, a minor, by and through his mother and next friend, Betty L. Watson,

Plaintiffs-Appellants,

v.

BILL WEAVER; TOM NEWTON; ANDREW S. HARTMAN; ANDREW S. HARTMAN, P.C., an Oklahoma corporation; BARKLEY, RODOLPH, WHITE & HARTMAN, a law firm composed of Michael Barkley, Charles Michael Barkley, P.C., an Oklahoma corporation, Stephen J. Rodolph, Jay B. White, Andrew S. Hartman, Andrew S. Hartman, P.C., an Oklahoma corporation, Sandra Rodolph and Denise G. Hartman; S & T GAS TRANSMISSION COMPANY, INC., an Oklahoma corporation; JOHN DOE; JANE DOE; BOARD OF COMMISSIONERS OF OKMULGEE COUNTY, OKLAHOMA,

Defendants-Appellees.

No. 88-2796

(Filed Nov. 28, 1989)

ORDER

Before HOLLOWAY, Chief Judge, McKay, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter is before the court on appellants' petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellants have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, to the extent the petition seeks rehearing, it is denied on the merits, and the mandate is recalled. To the extent the petition seeks clarification of our original disposition, the parties are instructed that the remand of appellants' fourth amendment claim against appellees Hartman, Weaver, and Newsom [*sic*] is against those individuals in their personal capacities only. Appellants may not proceed against Sheriff Weaver or Deputy Sheriff Newton in their official capacities, nor may they proceed against Mr. Hartman's professional corporation.

The petition having been denied on the merits by the panel to whom the case was submitted, the petition for rehearing with suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc,

Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

The mandate shall issue forthwith.

Entered for the Court

ROBERT L. HOECKER, Clerk

By/s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk